FILED
NOV 4 1994

No. 94-365

In The

Supreme Court of the United States

October Term, 1994

PAULA JO GRANT,

Plaintiff/Petitioner,

v.

LONE STAR COMPANY, ET AL.,

Defendants,

and

MITCHELL L. MURRAY,

Defendant/Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

LAWRENCE D. SMITH
GROCE, LOCKE & HEBDON
A Professional Corporation
1800 Frost Bank Tower
San Antonio, Texas 78205
(210) 246-5000
(210) 246-5999 – Telefax

Attorney of Record for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether back pay damages can be awarded against an employee in his individual capacity under Title VII of the Civil Rights Act of 1964, as amended?

2. Whether a trial court can use the grant of equitable power contained in 42 U.S.C. § 2000e-5(g)(1) to award back pay damages against an employee in his individual capacity?

3. Whether there exists a conflict in the decisions among the United States Circuit Courts of Appeals regarding whether back pay damages can be awarded against an employee in his individual capacity requiring resolution by this Honorable Court?

LIST OF PARTIES

Paula Jo Grant Landry	Plaintiff/Appellee/Petitioner
Mitchell Murray	Defendant/Appellant/Respondent

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING WRIT 2

THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT CONGRESS DID NOT INTEND THAT BACK PAY DAMAGES UNDER TITLE VII BE AWARDED AGAINST EMPLOYEES IN THEIR INDIVIDUAL CAPACITY 2

COURTS DO NOT HAVE GENERAL EQUITABLE POWERS TO AWARD BACK PAY DAMAGES AGAINST EMPLOYEES IN THEIR INDIVIDUAL CAPACITY UNDER TITLE VII 7

NO TRUE CONFLICT OF DECISIONS EXISTS AMONG THE CIRCUIT COURTS OF APPEALS ON THE ISSUE PRESENTED IN THIS CASE 8

THE PRESENT MATTER IS, BECAUSE OF OTHER FACTORS, NOT APPROPRIATE FOR THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI 10

TABLE OF CONTENTS – Continued

Page

(1) SPECIFIC CONCLUSIONS OF LAW RENDERED BY TRIAL COURT PRECLUDE AWARD OF DAMAGES AGAINST RESPONDENT 10

(2) FAILURE OF PETITIONER TO NAME MURRAY AS A RESPONDENT IN CHARGE OF DISCRIMINATION BARS ANY AWARD AGAINST HIM 11

(3) THE FINDINGS OF THE JURY AND COURT PRECLUDE THE IMPOSITION OF INDIVIDUAL LIABILITY AGAINST RESPONDENT... 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 12

Cera International Corp., 272 NLRB No. 209, 117 LRRM 1490 (1984) 13

Concrete Manufacturing Co., 262 NLRB 727, 110 LRRM 1353 (1982) 13

Eggleston v. Chicago Journeymen Plumber's Local Union No. 130, U.A., 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) 8

F & W Oldsmobile, Inc., 272 NLRB No. 184, 117 LRRM 1478 (1984) 13

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 8

Glus v. G.C. Murphy Co., 562 F.2d 880 (3rd Cir. 1977) 8

Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985) 8

INS v. Pangilinan, 486 U.S. 875 (1986) 8

Jones v. Continental Corp., 789 F.2d 1225 (6th Cir. 1986) 8, 10

Miller v. Maxwell's Int'l, Inc., 991 F.2d 583 (9th Cir. 1993), *cert denied*, ___ U.S. ___, 127 L.Ed.2d 372 (1994) 3, 8, 9, 10

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) ... 3, 6

NLRB v. Deena Artware, Inc., 361 U.S. 398 (1960) 12

NLRB v. Greater Kansas City Roofing, 2 F.3d 1047 (10th Cir. 1993) 12, 14

TABLE OF AUTHORITIES – Continued

Page

Packard Motor Co. v. National Lab. Rel. Bd., 330 U.S. 485 (1947) 4, 6

Paroline v. Unisys Corp., 879 F.2d 100, (4th Cir. 1990), modified on other grounds, 900 F.2d 227 (4th Cir. 1990) 9, 10

Riley Aeronautics Corp., 178 NLRB 495, 74 LRRM 1543 (1969) 13

Romain v. Kurek, 836 F.2d 241 (6th Cir. 1987) 8

Romero v. Union Pacific R.R., 615 F.2d 1303 (10th Cir. 1980) 8

Sattar v. Unocal Corp., 829 F.Supp. 331 (N.D. Cal. 1993) 5

Sedlacek v. Hach, 752 F.2d 333 (8th Cir. 1985) 9

Weiss v. Coca-Cola Bottling Co. of Chicago, 772 F.Supp. 407 (N.D. Ill. 1991) 5

STATUTES

29 U.S.C. § 152(2) 4

29 U.S.C. § 160(c) 12

42 U.S.C. § 2000a, *et seq* 5

42 U.S.C. § 2000e(b) 2, 6

42 U.S.C. § 2000e-5(f)(1) 11

42 U.S.C. § 2000e-5(g) 5

42 U.S.C. § 2000e-5(g)(1) 2, 7, 10, 12, 13

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 2000e-2 ..... 4, 5

42 U.S.C. §§ 1981, 1983, 1985, 1986 5

MISCELLANEOUS AUTHORITIES

Barbara Lindemann Schlei & Paul Grossman, Employment Discrimination Law (2nd Ed. 1983) 12

29 C.F.R. § 1604.11 (1985) 4

OPINIONS BELOW

Petitioner for the most part accurately recites the opinions below in this case. However, certain matters germane to the disposition of the Petition were not included. Specifically, the trial court's complete statement for the record constituting its findings of fact and conclusions of law was not contained in Petitioner's Appendix because the trial court's findings regarding Petitioner's trust fund theory were not contained therein. Additionally, the jury verdict on Petitioner's trust fund theory was not contained in the Appendix to the Petition. Respondent includes these matters in his Appendix. *See* App. 1-7.

JURISDICTION

Respondent agrees with the jurisdictional statements made in Petitioner's Brief, except that Respondent asserts that no true conflict of decisions exists among the United States Circuit Courts of Appeals on the issue decided by the court below.

STATUTORY PROVISIONS

The key statutory provisions of Title VII at issue in this matter were adequately set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

During the trial of this matter, Petitioner sought to recover damages from individual Defendants on her claims. Pursuant to this theory, Petitioner requested that the jury be instructed on a state law trust fund theory which would have permitted Petitioner to recover monies from certain Defendants in their individual capacities. Interrogatories were submitted to the jury regarding Petitioner's trust fund theory. Respondent was not included in these Jury Interrogatories. The jury found against Petitioner on the trust fund theory. App. 1-3. Following the return of the jury's verdict on this trust fund theory, the trial court also made findings on the trust fund theory. The trial court adopted the jury's findings and found against Petitioner on the trust fund theory. App. 4-7.

REASONS FOR DENYING WRIT

THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT CONGRESS DID NOT INTEND THAT BACK PAY DAMAGES UNDER TITLE VII BE AWARDED AGAINST EMPLOYEES IN THEIR INDIVIDUAL CAPACITY

Title VII of the Civil Rights Act of 1964, as amended, defines "employer" as any person engaged in interstate commerce with 15 or more employees and any *agent* of that employer. 42 U.S.C. § 2000e(b). Back pay damages under Title VII are payable by the *employer*, employment agency or labor organization responsible for the unlawful discrimination. 42 U.S.C. § 2000e-5(g)(1). Petitioner

asserts that these provisions of Title VII reflect a Congressional intent to hold employees in their individual capacity liable for back pay damages and that the Fifth and Ninth Circuit Courts of Appeals have erred in concluding otherwise.

Congress did not intend that employees in their individual capacity be liable for back pay damages under Title VII. Congress intended that the inclusion of "any agent" in the definition of "employer" incorporate the doctrine of *respondeat superior* into Title VII rather then impose individual liability on employees. Courts have found that the agent term was intended incorporate the doctrine of *respondeat superior*. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 584 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 127 L.Ed.2d 372 (1994). This *respondeat superior* intention is also reflected in the provision of 42 U.S.C. § 2000e-(5)(g)(1) which provides that back pay awards are payable by the employer *responsible* for the discriminatory actions. (Emphasis added.)

The notion that the inclusion of "any agent" in the definition of "employer" was meant to impose *respondeat superior* liability rather than individual liability is also reflected in Justice Marshall's concurring opinion in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Justice Marshall discussed the notion of *respondeat superior* liability under Title VII. He observed that corporations and companies can only act through their supervisors and employees and, despite the realities of how Title VII violations occur, Title VII remedies such as reinstatement and back pay generally run against the employer as an entity. Further, the acts of supervisory employees and agents are imputed to the employer. *Id.* at 75. Justice

Marshall's comments indicate that the employing entity will be held liable for the acts of its agents and, conversely, that employees in their individual capacity are not liable for back pay damages. *See also* 29 C.F.R. § 1604.11(c),(d) (1985). (EEOC guidelines regarding sexual harassment liability only consider liability of employing entity for acts of agents, supervisory employees and co-workers but do not mention individual liability.)

This Honorable Court has determined that an analogous provision in the National Labor Relations Act was meant to incorporate the concept of *respondeat superior*. In *Packard Motor Co. v. National Lab. Rel. Bd.*, 330 U.S. 485 (1946), the Court reviewed the definition of "employer" under the National Labor Relations Act, which at that time defined employer as including any person acting in the interest of an employer. 29 U.S.C. § 152(2). The Court observed that the purpose of the definition was to render employers responsible for acts of persons performed in their interests. This definition was also an adaptation of the common law concept of *respondeat superior* into the NLRA. *Id.* at 489.

The structure of Title VII reflects a Congressional intent that employees cannot be held liable in their individual capacity for back pay damages. Under Title VII, employers are prohibited from engaging in discriminatory actions. *See* 42 U.S.C. § 2000e-2. Individuals are not. Under Title VII, back pay damages are to be paid by the employer, labor organization or employment agency responsible for discriminatory acts. This provision refers to entities, not individuals. Further, the very use of the term "agent" implies that the agent is acting on behalf of the employing entity and, therefore, not in an individual

capacity. *Cf. Sattar v. Unocal Corp.*, 829 F.Supp. 331 (N.D. Cal. 1993). ("Any agent" term in 42 U.S.C. § 2000e(b) defined as entity distinct from employer, not employee.) Finally, the type of damages authorized under 42 U.S.C. § 2000e-5(g) are of the type which are logically only awardable against the employing entity. *See Weiss v. Coca-Cola Bottling Co. of Chicago*, 772 F.Supp. 407, 411 (N.D. Ill. 1991).

Just as important as the specific provisions contained in Title VII is what is absent from Title VII. Congress did not include among the parties subject to liability under 42 U.S.C. § 2000e-5(g) the individual employee committing or engaging in discriminatory acts. Congress did not proscribe in 42 U.S.C. § 2000e-2 discriminatory conduct by an employee acting in his individual capacity. Congress could have but did not include within these provisions of Title VII a specific prohibition that an employee acting outside the scope of his employment is prohibited from engaging in discriminatory acts or that the employee will be held individually liable for back pay damages.

Congress' failure to specifically provide for individual liability is even more evidence of an intent not to hold employees individually liable under Title VII since Congress provided for liability against persons in other civil rights statutes. Title II of the Civil Rights Act of 1964 specifically provides that remedies can be levied against persons and persons responsible for illegal acts. *See* 42 U.S.C. § 2000a, *et seq.* Further, Congress has proscribed conduct by persons in other civil rights statutory schemes. *See* 42 U.S.C. §§ 1981, 1983, 1985, 1986. These statutes reflect that where Congress intended to provide

for individual or personal liability it said so in plain language. Congress' failure to specifically do so in Title VII reflects an intent that employees in their individual capacity not be liable for back pay damages.

Petitioner argues that liability should be extended to Repondent in his individual capacity because it would be her only remedy in this case since the corporate employer sold its assets and filed bankruptcy. Petitioner's argument is misplaced because she had a remedy; she could have litigated her claim against the corporate entity in the bankruptcy proceedings.[1] Title VII does not guarantee collection of a judgment. Permitting Title VII monetary remedies to extend to an individual employee based upon the collectability of a judgment against the employing entity would be illogical and would create the possibility of an inconsistent application of the back pay remedy provided in the statute because its application would depend upon the solvency, total or partial, of the employing entity.

Congress intended that the definition of "employer" contained in 42 U.S.C. § 2000e(b) incorporate *respondeat superior* liability. The inclusion of "and any agent" in the definition of "employer" prevents an employing entity from asserting that it is not liable for the conduct of its agents. Congress' intent is reinforced by Justice Marshall's concurring opinion in *Meritor Savings Bank v. Vinson, supra,* and the Court's opinion in *Packard Motor Co., supra.* Since Congress intended the definition of

---

[1] **Additionally, as noted by the court below, Petitioner had remedies under state law available to her. Petitioner lost on these claims.**

"employer" to incorporate the notion of *respondeat superior*, employees were not intended through this provision to be held liable for back pay damages in their individual capacity. Had Congress intended to do so, it would have clearly said so.

COURTS DO NOT HAVE GENERAL EQUITABLE POWER TO AWARD BACK PAY DAMAGES AGAINST EMPLOYEES IN THEIR INDIVIDUAL CAPACITY UNDER TITLE VII

Petitioner asserts that the trial court's equitable powers could be exercised to levy a back pay award against Respondent in his individual capacity. Petitioner suggests that this can be done even if the employee/agent was not included within the statutory definition of an employer. The crux of Petitioner's second point is that, even if Title VII did not authorize an award of back pay against an employee in his individual capacity, the trial court could exercise its equitable powers to levy such an award.

Petitioner's point is not well founded. 42 U.S.C. § 2000e-5(g)(1) specifies the entities responsible for the payment of back pay damages. By specifically providing from whom this remedy is recoverable, the statute thereby precludes the court from levying that remedy against entities, including individuals, not listed in 42 U.S.C. § 2000e-5(g)(1).

Petitioner's suggestion that the trial court could levy an award of back pay against an employee in his individual capacity as an exercise of its equitable powers even if Title VII did not authorize such an award is contrary to

case law. In general, a court cannot exercise its equitable powers to grant relief outside of that authorized by the statute involved. *See INS v. Pangilinan*, 486 U.S. 875, 883-84 (1986). More specifically, courts may not grant through the use of their equitable powers a remedy which is not authorized by Title VII. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9, 578-79 (1984).

NO TRUE CONFLICT OF DECISIONS EXISTS AMONG THE CIRCUIT COURTS OF APPEALS ON THE ISSUE PRESENTED IN THIS CASE

Petitioner asserts that the decision of the Court of Appeals for the Fifth Circuit below, as well as the decision of the Ninth Circuit in *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 127 L.Ed.2d 372 (1994), conflicts with the decisions of other circuit courts of appeals on the issue of the liability for back pay awards of employees in their individual capacity. However, a review of the decisions cited by Petitioner indicates that no true conflict exists between the Fifth Circuit's decision below, the Ninth Circuit's decision in *Miller, supra,* and the cases cited by Petitioner.

Petitioner cites a series of cases asserting that they establish a conflict between this case and other cases regarding individual liability. *See Glus v. G.C. Murphy Co.*, 562 F.2d 880 (3rd Cir. 1977); *Romero v. Union Pacific R.R.*, 615 F.2d 1303 (10th Cir. 1980); *Eggleston v. Chicago Journeymen Plumber's Local Union No. 130, U.A.*, 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Romain v. Kurek*, 836 F.2d 241 (6th Cir. 1987); *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir 1986); *Greenwood v. Ross*, 778

F.2d 448 (8th Cir. 1985); *Sedlacek v. Hach*, 752 F.2d 333 (8th Cir. 1985). However, a simple reading of these cases reflects that not one of them specifically considered and actually determined the issue of individual liability under Title VII or an award of back pay damages against employees in their individual capacity.

The Fourth Circuit's opinion in *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1990), *modified on other grounds*, 900 F.2d 227 (4th Cir. 1990), also does not truly conflict with the Fifth Circuit's decision below or the decision in *Miller, supra*. Specifically, *Paroline* involved the consideration on appeal of a summary judgment granted to the defendant/corporation and the employee/manager. The summary judgment was not based upon the claim that an individual cannot be personally liable for back pay damages under Title VII. The issue of whether an individual could be personally liable for back pay damages under Title VII was not presented to the Fourth Circuit for determination. The Fourth Circuit did not reverse the grant of the summary judgment on the basis that an individual could be held liable for back pay damages under Title VII. These were the issues specifically addressed in both the Fifth Circuit's decision below and *Miller, supra*. As a result, no true conflict in decisions exists which would warrant the grant of a writ of certiorari in this case.

Additionally, this Court has recently denied a petition for writ of certiorari based upon Petitioner's exact same argument citing some of the same cases. Specifically, in the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by the petitioner in *Miller, supra,* the petitioner specifically

requested that writ of certiorari be granted because the Ninth Circuit's decision conflicted with the decisions of other circuit courts. The petitioner asserted that the Ninth Circuit's decision conflicted with *Paroline, supra,* and *Jones v. Continental Corp., supra.* This Court denied the petition for writ of certiorari. Petitioner herein cites no cases which have arisen since the denial of the petition for writ of certiorari in *Miller, supra,* which establish a conflict with either the Fifth Circuit's decision below or *Miller, supra.*

THE PRESENT MATTER IS, BECAUSE OF OTHER FACTORS, NOT APPROPRIATE FOR THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI

In addition to the reasons indicated above, there are other factors about this case which make granting the petition for writ of certiorari inappropriate. These factors are such that the petition for writ of certiorari should be denied.

(1) SPECIFIC CONCLUSIONS OF LAW RENDERED BY TRIAL COURT PRECLUDE AWARD OF DAMAGES AGAINST RESPONDENT

As previously indicated, the trial court issued findings of fact and conclusions of law in this matter. However, certain findings of the court preclude any liability for back pay damages against Respondent Murray in his individual capacity. In Conclusion of Law No. 5, the court specifically stated that "I find that Mr. Murray is not liable as an employer, . . . " *See* Petition for Writ of Certiorari, A-34. Since 42 U.S.C. § 2000e-5(g)(1) provides

that back pay is to be paid by the employer responsible for the illegal discrimination, the trial court's specific conclusion that Respondent was not liable as an employer bars any award of back pay damages against him.

(2) FAILURE OF PETITIONER TO NAME MURRAY AS A RESPONDENT IN CHARGE OF DISCRIMINATION BARS ANY AWARD AGAINST HIM

42 U.S.C. § 2000e-5(f)(1) specifically provides that, within 90 days after the giving of a notice of right to sue, a civil action may be brought against the respondent named in the charge. Therefore, in order for any person to be subject to liability under Title VII, that person must first be named a respondent in a charge of discrimination filed with the United States Equal Employment Opportunity Commission.

In the present case, it is undisputed that Petitioner did not name Murray as a respondent in the charge of discrimination she filed with the EEOC. The only evidence admitted by the court on this issue was the actual charge filed with the EEOC and it is undisputed that Murray was not named in that charge. Petitioner attempted to introduce into evidence her affidavit submitted with her charge of discrimination, but it is undisputed that the court did not admit the affidavit into evidence. Petitioner did not challenge that evidentiary decision as error on appeal. As a result, Petitioner's statements regarding what is contained in the affidavit are immaterial, irrelevant, and inappropriate. Since the only evidence in the record of this case establishes that Murray was not named in the charge of discrimination and was

not a named respondent in the charge, the language of Title VII establishes that no damages can be levied against him.

(3) THE FINDINGS OF THE JURY AND COURT PRECLUDE THE IMPOSITION OF INDIVIDUAL LIABILITY AGAINST RESPONDENT

Assuming, *arguendo*, that the inclusion of "any agent" in the definition of "employer" authorizes an award of back pay damages against an employee in his individual capacity, the question to be answered would be: What standard for assessing individual liability under the damages provision of Title VII should apply? The likely place for guidance on a standard for assessing such individual liability would be Section 10(c) of the National Labor Relations Act. 29 U.S.C. § 160(c). Since the back pay provision of Title VII was modeled after that provision, it is appropriate to look to interpretations of this section of the NLRA for guidance on the scope of 42 U.S.C. § 2000e-5(g)(1) as it pertains to the possible award of back pay damages against an employee in his individual capacity. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975); *Barbara Lindemann Schlei & Paul Grossman, Employment Discrimination Law*, 1418 n.2 (2nd Ed. 1983).

Under 29 U.S.C. § 160(c), the general rule is that a stockholder will not be held individually liable for back pay damages. The insulation of the stockholder from obligations of the corporation is the norm and not the exception. *See NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960); *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993). Under the NLRA, back pay

damages are generally only assessed against individuals where the corporate structure is employed to perpetuate fraud, evade existing obligations or circumvent a statute. *See Concrete Manufacturing Co.*, 262 NLRB 727, 110 LRRM 1353 (1982); *Riley Aeronautics Corp.*, 178 NLRB 495, 501, 74 LRRM 1543 (1969). Decisions under the NLRA generally only impose individual liability for back pay where the owner is engaged in outrageous conduct including receiving money from escrow accounts established for disbursements to creditors, converting company assets to their own use, or acting to hinder, delay or defraud board orders. *See e.g. Concrete Manufacturing Co.* supra, *Cera International Corp.*, 272 NLRB No. 209, 117 LRRM 1490 (1984); *F & W Oldsmobile, Inc.*, 272 NLRB No. 184, 117 LRRM 1478 (1984).

The findings of the jury and the court do not support, under these authorities, imposition of any liability against Respondent in his individual capacity. The court did not find that Respondent was a stockholder or controlling shareholder of the employing entity. Both the court and the jury found against the Petitioner on her trust fund theory of liability, which would have been the only way Petitioner could have argued that she could recover damages from employees in their individual capacity under the authorities cited above. Therefore, to the extent that decisions under the National Labor Relations Act provide the standard for the determination of individual liability under 42 U.S.C. § 2000e-5(g)(1), if such liability is even authorized, the jury findings and findings of fact establish that Respondent cannot be held individually liable for Petitioner's back pay damages. *See*

NLRB v. Greater Kansas City Roofing, 2 F.3d 1047 (10th Cir. 1993) (enforcement denied).

CONCLUSION

Respondent, Mitchell Murray, respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

LAWRENCE D. SMITH
GROCE, LOCKE & HEBDON,
A Professional Corporation
1800 Frost Bank Tower
San Antonio, Texas 78205
(210) 246-5000
(210) 246-5999 – Telefax

Attorney of Record
for Respondent
Mitchell L. Murray

November 4, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAULA JO GRANT LANDRY, Plaintiff, v. LONE STAR COMPANY, B.L. WATSON, M.A. PETSCH, EDWARD C. THOMAS, JAY CLAYTON, BEN A. LANFORD, JR., MITCHELL L. MURRAY, KEITH OVERSTREET, WILLIAM P. MIDDLETON, DENNIS THOMLINSON, and TOMBO S. FAVER, Defendants.	§ § § § § § § § § § § § § § § §	CIVIL ACTION NO. H-89-2018

SPECIAL INTERROGATORIES

(Filed JUN 18, 1992)

SPECIAL INTERROGATORY NO. 1

Do you find, from a preponderance of the evidence, that any one or more of the Defendants listed below engaged, recklessly or intentionally, in extreme and outrageous conduct with the intent to inflict severe emotional distress upon Paula Jo Grant Landry?

Answer "Yes" or "No" opposite the names of the Defendants listed below:

ANSWER: Tombo S. Favor No
Mitchell L. Murray No

* * *

If you answered "Yes" as to any one or more of the Defendants listed in Special Interrogatory No. 13, then answer Special Interrogatory No. 14; otherwise, do not answer Special Interrogatory No. 14.

SPECIAL INTERROGATORY NO. 14

Do you find from a preponderance of the evidence that Lone Star Company became insolvent and ceased to do business and that one or more of the Defendants named below received assets from Lone Star Company or appropriated assets to himself?

Answer "Yes" or "No" as to each Defendant listed below.

ANSWER:	B. L. Watson	No
	M. A. Petsch	No
	Ben A. Lanford, Jr.	No

If you answered "Yes" as to any one or more of the Defendants listed in Special Interrogatory No. 14, then answer Special Interrogatory No. 15 as to each such Defendant; otherwise, do not answer Special Interrogatory No. 15.

SPECIAL INTERROGATORY NO. 15

What amount of assets of Lone Star Company did the Defendants listed below receive or appropriate from Lone Star Company?

Answer in dollars and cents as to each Defendant listed below.

ANSWER:	B. L. Watson	$0
	M. A. Petsch	$0
	Ben A. Lanford, Jr.	$0

June 18, 1992
Date

/s/ James W. Meek
Foreperson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAULA JO GRANT Plaintiff vs. B. L. WATSON, M. A. PETSCH EDWARD C. THOMAS JAY CLAYTON BEN A. LANFORD, JR. MITCHELL L. MURRAY DENNIS THOMLINSON TOMBO S. FAVER Defendants	CIVIL NO. 89-CV-2018 Houston, Texas June 18, 1992 8:30 a.m.

VOLUME VI

TRIAL

BEFORE THE HONORABLE SIM LAKE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	MARY L. SINDERSON Attorney at Law 2990 Richmond Ave., Suite 205 Houston, Texas 77098-3109
For the Defendants Watson, Petsch, Thomas, Clayton, Lanford, Murray, and Thomlinson:	CYNTHIA GLASS BIVINS and JOHN FRANCO Attorneys at Law 1800 Frost Bank Tower San Antonio, Texas 78205

Court Reporter: WILLA J. FARIS, R.P.R.
Official Court Reporter
United States District Court
515 Rusk, Room 8032
Houston, Texas 77002
(713) 250-5034

[p. 966] THE COURT: Be seated, sir.

First of all, in the event that Special Interrogatories 14 and 5 are subsumed within my jurisdiction as a fact-finder under Title VII, I make the following findings under Rule 52 of the Federal Rules of Civil Procedure.

I find that neither Mr. Watson, Mr. Petsch, or Mr. Lanford – let me restate that – I find that a preponderance of the evidence does not establish that Lone Star Company became insolvent and ceased to do business, and that [p. 967] either Mr. Watson, Mr. Petsch, or Mr. Lanford received assets from Lone Star Company or appropriated assets to themselves.

I'm satisfied that all the remuneration that each of these defendants received was in the ordinary course of business as an employee, and with respect to Mr. Watson was incident to a routine agreement whereby he agreed not to compete with Quality Beverage.

Therefore I would find "No" with respect to each of those elements. All right.

* * *

[p. 992] I find that the liability here should be joint and several, because there is no way feasibly to apportion individual liability between the two defendants for the conduct that I have found resulted in their liability.

Plaintiff will furnish – plaintiff's counsel will furnish to defendants' counsel and to Mr. Faver within 10 business days an itemization of her fees and expenses, and any additional factors which she believes justify additional fee under Johnson versus Georgia Highway Express.

Defendant will have 10 days to respond with respect to the accuracy of the fees and expenses.

Hopefully, the parties can agree on the plaintiff's attorney's fees. I'm uncertain in this case whether the plaintiff is entitled to a full recovery since the plaintiff was unsuccessful on a substantial amount of the relief sought, [p. 993] both Title VII relief against many of the defendants and tort relief against all of the defendants. But I'm unclear because I haven't had a chance to review the law what apportionment would be appropriate, and I would hope that the parties could agree on that. If not, send to me in chambers within 30 days your positions on attorney's fees and a proposed form of judgment, and I will schedule a hearing on the attorney's fees.

MS. SINDERSON: Yes, sir. Your Honor, may I request one additional factual finding?

THE COURT: What?

MS. SINDERSON: And that is with respect to the majority ownership in your factual finding, Watson, Petsch, and Lanford I believe we also need Mr. Clayton to constitute a majority.

THE COURT: I didn't find that he was involved, I know you had him in there, but I don't find –

MS. SINDERSON: I understand that, but I thought that finding just went to who controlled the majority.

THE COURT: No. I don't think it's relevant in any event, because I found no liability against him, and because both I and the jury have found against you on the trust fund theory.

Anything else, Miss Bivins?

MS. BIVINS: No, sir.

THE COURT: All right.

* * *